Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CITY OF SANTA CLARITA,
Petitioner,

v.

COUNTY OF LOS ANGELES, CEMEX, INC., AND UNITED STATES BUREAU OF LAND MANAGEMENT,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a court approve a consent decree to which a nominally adverse plaintiff and defendant stipulate where that consent decree disposes of properly presented claims of a nonconsenting intervenor as of right without any adjudication of that intervenor's legally protectable interest?

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The City of Santa Clarita, California (hereinafter Santa Clarita), respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming entry of judgment, *Cemex Inc. v. Los Angeles County*, 2006 WL 314481 (CA9 Feb. 10, 2006) (unpublished) is Appendix A. A prior decision of the Ninth Circuit granting Santa Clarita intervention, *Cemex, Inc. v. County of Los Angeles*, 92 Fed. Appx. 457, 2004 WL 363354 (CA9 2004) (unpublished) is Appendix B. The order of the United States District Court for the Central District of California approving the consent decree at issue, ordering its entry as judgment, and containing the text of the consent decree (unpublished) is Appendix C. The District Court's *ex parte* order taking Santa Clarita's motion for summary judgment off calendar (unpublished) is Appendix D.

JURISDICTION

On February 10, 2006, the United States Court of Appeals for the Ninth Circuit issued its decision affirming the judgment of the United States District Court for the Central District of California and directed the clerk to issue its mandate forthwith. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The District Court's jurisdiction in the first instance was invoked under 28 U.S.C. §§ 1331 and 1343(3).

STATEMENT OF CASE

This case concerns the proposal of Respondent Cemex, Inc. (hereinafter Cemex) to expand the Soledad Canyon sand and gravel mine, to permit the extraction of 56.1 million tons of sand and gravel, App. C-39—equal to five tons per minute for the next 20 years—just outside the limits of Santa Clarita.[1]

The former owner of the site had, into the 1980s, been mining sand and gravel understood to belong to it, but in 1983 this Court held that gravel is a mineral reserved to the United States. *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983); but see *BedRoc Limited, LLC v. United States*, 541 U.S. 176 (2004) (in which six Members of the Court express the view that *Watt* was wrongly decided). That redefined the "split estate," moving ordinary gravel that had been understood to be part of the "surface estate" to the federal government's "mineral estate." After the federal government brought a series of trespass actions, the former surface owner's operation terminated in 1988. App. C-39. Santa Clarita subsequently purchased the surface estate. App. G-5.

The Bureau of Land Management (BLM) put the mining rights up to bid. App. C-39. In 1989 BLM awarded Cemex a 20-year contract to extract and sell 56.1 million tons of sand and gravel. App. C-10. Also in 1989 BLM prepared an Environmental Assessment of the sale under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f, App. C-39, followed in 2000 by BLM's approval of a Final Environmental Impact Statement under NEPA and

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[1]Santa Clarita is the fourth-largest city in Los Angeles County, with a population of 167,974. (California Dept. of Finance, Demographic Research Unit, E-4 Population Estimates for Cities, Counties and the State, 2001-2005, with 2000 DRU Benchmark.)

publication of the BLM Record of Decision (ROD), App. C-41. The environmental review identified significant issues, including impacts on endangered species, App. C-40, 42-43, 47, traffic, App. C-47-48, air quality, App. H-17, water quality and water resources, *ibid.*, and public health, *ibid.* BLM concluded it had adequately mitigated all of the impacts except visual and air-quality. App. C-41.

The BLM ROD required that the project fully comply with all applicable state and local laws and secure all permits required by state law, including approval by the County of Los Angeles (hereinafter the County). App. H-20-22. In May 1991 Cemex applied to the County for a surface mining permit under the California Surface Mining and Reclamation Act (SMARA), Cal. Pub. Res. Code Ann. §§ 2710-2796.5 (West 2001). App. C-43. In the course of processing the application, the County commenced preparation of an Environmental Impact Report (EIR) under the California Environmental Quality Act (CEQA), Cal. Pub. Res. Code Ann. §§ 21000-21177 (West Supp. 2006). Santa Clarita actively participated in the CEQA review process, opposing Cemex's expansion of mining operations. App. H-17.

On January 25, 2002, shortly after the County expressed concerns with the project's traffic impacts, Cemex filed this action in the District Court, alleging that the County's review under CEQA was preempted. App. C-48, App. F. The County Board of Supervisors subsequently denied the project as proposed. App. C-49-50.

Cemex's District Court complaint alleged that, notwithstanding BLM's requirement that the project comply with all applicable state and local laws and secure permits from the County, H-18-21, BLM's project approval preempted the County's review of the project. App. C-50-56; App. F. The United States moved to intervene as a plaintiff, citing its ownership of the sand and gravel and its interest as

recipient of royalties from Cemex; it recognized the state's right to enforce its environmental laws but claimed that was limited in this case and objected to delays in County review. App. C-56-58.

Santa Clarita also moved to intervene. App. B. The District Court twice denied Santa Clarita intervention. The Court of Appeals reversed, holding that Santa Clarita had significant legally protectable interests in the subject matter of Cemex's action that could, as a practical matter, be impaired by potential disposition of the case. *Ibid.* The Court found that the District Court had impermissibly ignored Santa Clarita's interests under the environmental laws that Cemex was seeking to have preempted and directed the lower Court to grant Santa Clarita intervention as of right. App. B-8.

On March 9, 2004, Santa Clarita filed its answer in intervention to the second amended complaint, App. G, and on April 5, 2004, in compliance with the then-existing scheduling order, Santa Clarita filed a motion for summary judgment to dispose of all of Cemex's claims, including the preemption claims, App. H.

The County had initially vigorously defended its jurisdiction, consistent with the concerns that its Board of Supervisors, Regional Planning Commission, and Department of Public Works had expressed about the project. App. C-45-50. However, by the time Santa Clarita returned to the District Court, the County had changed sides, agreeing, in negotiations from which Santa Clarita had been excluded, App. C-100-102, to a consent decree that (1) agrees to federal preemption of its environmental review, App. C-60-63; (2) stipulates to adequacy of the review already conducted, App. C-63-67; (3) "expressly revokes" its prior positions to the contrary, App. C-71-72; (4) commits the County to certify its most recent draft EIR "with no further public review or comment," App. C-71-73; (5) requires the County to adopt a

"Statement of Overriding Considerations," see Cal. Pub. Res. Code Ann. § 21081(b) (West 1996), and specifies the text, App. C-80; and (6) compels the County to issue permits and make findings approving the project, App. C-73-74, 76-80.

Santa Clarita objected to entry of the consent decree, App. I, and urged the Court to hear its pending motion for summary judgment before considering the consent decree. Instead, the Court, on Cemex's motion, took Santa Clarita's summary judgment motion off calendar, App. D-2, and then proceeded to enter the consent decree, App. C-85-125, over Santa Clarita's objections, *ibid.*, App. I. Although the consent decree recites that it is not "binding" on any nonconsenting party, in fact, as set out below, the consent decree has since been relied upon to terminate Santa Clarita's rights. App. J-7-9, 21-22.

Santa Clarita appealed to the Ninth Circuit, which affirmed in a memorandum disposition. App. A. The Court reviewed approval of the consent decree for "'fraud or overreaching by, or collusion between, the negotiating parties, and [to determine] that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned'"—the circuit's standard for review of class-action settlements. App. A-2, quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (CA9 1982). The Court found Cemex's preemption claim "plausible." *Ibid.* The panel directed that its mandate issue forthwith and retained jurisdiction of all future appeals involving the Soledad Canyon project. App. A-3.

SUMMARY OF ARGUMENT

A party, including an intervenor as of right, may not have its rights terminated without an adversarial

determination on the merits. This much should be axiomatic, and it is generally so recognized. But, perhaps surprisingly, this is not so in an important set of cases, called in the literature "bilateral settlements" of "trilateral disputes." In such cases, as illustrated here, the courts have come routinely, even matter-of-factly, to approve "consent decrees" to which some of the parties have stipulated, that bind nonconsenting parties, who are denied the opportunity to litigate the rights the consent decree determines.

The problem can be traced in large part to this Court's decision in *Firefighters v. Cleveland*, 478 U.S. 501 (1986), where the Court approved a consent decree calling for preferential minority promotions over the objections of the intervenor union. While the opinion can be read to say that the objecting union had, in effect, waived any objections by not asserting any "claims" adverse to the settling parties, that is not how the courts have been reading the case. It has frequently—but not uniformly—been taken as authority to bind non-settling parties to litigation without according them the opportunity to litigate their claims. The problem is particularly acute when the non-settling party is, as Santa Clarita was in this case, an intervenor-defendant.

Based largely on *Firefighters*, courts now routinely approve consent decrees that abrogate the rights of nonconsenting parties. The practice sanctions the externalization of the costs of the settlement onto the nonconsenting party. It has led to widespread abuse in litigation over employment discrimination, religious freedom and other personal liberties, land and water rights, economic and environmental regulation, and a host of other cases where parties have agreed to a federal decree binding other parties to the litigation without their consent and without adjudicating the merits of their claims.

The fallacy of these cases is illustrated by the procedure the courts have employed, treating nonconsenting parties not like the plaintiffs or defendants they are but like class members objecting to a settlement. A "fairness hearing" for a class-action settlement is an inquiry whether the settlement negotiated by the class' representative is fair to the class, explicitly eschewing assessment of the merits of the class' claim. It is no place for merits rulings against nonconsenting parties on a finding that the agreement negotiated by adverse parties is somehow "fair."

Recognizing this right of a nonconsenting party does not preclude settlements by parties who do not wish to continue the fight. They may fully compromise their own interests so long as the resolution does not terminate the rights of other parties. But if they wish to resolve third parties' rights, each settling party must defend its adverse claims against the third parties—or simply step aside, declining to litigate its interests and allowing other parties to do so. This serves the substantial judicial interest in favor of voluntary resolution of disputes, but does so without abridging the due process rights of other litigants.

ARGUMENT

I. A Bilateral Consent Decree Cannot Resolve the Claims of a Nonconsenting Third-Party Intervenor as of Right

It is axiomatic that two parties to a lawsuit may not stipulate away the rights of a third, nonconsenting party. See *Firefighters*, 478 U.S., at 529 ("parties who choose to resolve litigation through settlement may not dispose of the claims of

a third party . . . without that party's agreement"); *United States v. City of Miami*, 664 F.2d 435, 442 (CA5 1981) (en banc) (Rubin, J.) (defendant union's consent required before court could approve portion of consent decree infringing union's contractual rights). This principle applies with equal force whether the nonconsenting party is an original party to a lawsuit or a third-party intervenor as of right. *Firefighters*, 478 U.S., at 529 ("A court's approval of a consent decree between some of the parties . . . cannot dispose of the valid claims of nonconsenting intervenors."); *Wheeler v. American Home Products Corp.*, 582 F.2d 891, 896 (CA5 1977) ("[O]nce intervention has been allowed, the original parties may not stipulate away the rights of the intervener.") (internal quotation marks omitted), cited with approval in *Firefighters*, 478 U.S., at 529; *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 844-847 (CA5 1993) (hereafter *LULAC*).

An intervenor as of right becomes a full party to the action and is generally entitled to have its claims litigated "'just as if it were an original party.'" *Alvarado v. J.C. Penney Co., Inc.*, 997 F.2d 803, 805 (CA10 1993), quoting *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (CADC 1985). This includes the right to adjudication of its claims on the merits, whether through a motion for summary judgment or participation at trial. *United States v. City of Hialeah*, 140 F.3d 968, 976-978, 983 (CA11 1998); *Wheeler*, 582 F.2d, at 896; see also 7C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 1920 (3d ed. 2004) ("intervenor is entitled to litigate fully on the merits now that intervention has been granted") (internal quotation marks omitted). In the case of an intervenor-plaintiff, this right to adjudication entitles the intervenor to litigate fully any "claim" properly pled in its complaint-in-intervention, as required by Federal Rule of Civil Procedure 24(c).

Just as an intervenor-plaintiff is entitled to have its "claim" adjudicated before it is extinguished, an intervenor-defendant is entitled to have its "defense" adjudicated before being extinguished by judicial action. An intervenor-defendant is not required to plead "claims" in the traditional sense; rather, it is expected to assert properly pled "defense[s]." Fed. Rule Civ. Proc. 24(c); see *LULAC*, 999 F.2d, at 845-846 (defendant-intervenors have standing to defend current redistricting plan on appeal even if original defendants supported entry of consent decree, stating: "We have recognized that when fewer than all litigants forge a consent decree, issues affecting other parties remain to be adjudicated."). A party to the lawsuit, the intervenor cannot be said to have had its day in court if it is not permitted to litigate its claims and defenses on their merits.

The right of a party not to be bound by a consent decree to which it has not consented is illuminated by comparison to the rights of a *non-party* not to be bound by a consent decree. In *Martin v. Wilks*, 490 U.S. 755, 763 (1989), this Court held that one may not be bound by a consent decree entered in a case to which one was neither a party nor in privity with a party.[2] Rather, to be bound by a consent decree, the person must be joined as a necessary party under Federal Rule of Civil Procedure 19(a). *Martin*, 490 U.S., at 763-769. Necessary parties under Rule 19(a) and intervenors as of right under Rule 24(a) are defined virtually identically.[3] Of course,

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[2]Congress overrode *Martin* in the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(n), but "*Martin*'s holding remains intact outside of the employment discrimination setting." *Kourtis v. Cameron*, 419 F.3d 989, 999 n. 6 (CA9 2005).

[3]Here is the relevant text of Rule 24(a):

> Upon timely application anyone shall be permitted to intervene in an action: . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may

the plaintiff and defendant may not even *maintain their action*, absent certain conditions, if a necessary party under Rule 19(a) is not joined. Rule 19(b); see, *e.g.*, *Viacom Intern., Inc. v. Kearney*, 212 F.3d 721, 725 (CA2 2000). Yet under the rule followed by the Ninth Circuit here, a person having exactly the same interest in the matter who has actually asserted that interest by moving to intervene can have the case dismissed out from under it by the opposing parties—and will then be bound by the judgment. That cannot be the law. Cf. *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 329 (1971) (preclusion impermissible where "litigants . . . have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them . . . .").

In affirming the District Court's judgment entered upon the consent decree, the Ninth Circuit denied Santa Clarita its day in court. The Court of Appeals had previously held that Santa Clarita had a statutory right to consultation under the state's environmental laws, and a protectable interest in upholding the County's application of CEQA against Cemex's allegations of federal preemption. App. B-4-5. CEQA grants Santa Clarita a statutory, legally protectable right to consult with the County, the lead agency under the statute, regarding the environmental impacts of the proposed project, Cal. Pub. Res. Code Ann. § 21153(a) (West Supp. 2006), and also the right to seek judicial review, *id.*, § 21168

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as a practical matter impair or impede the applicant's ability to protect that interest . . . .

Here is the relevant language of Rule 19(a):

> A person . . . shall be joined as a party in the action if . . . the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect that interest . . . .

(West 1996), if the County denies Santa Clarita consultation rights or fails to discharge its duties to avoid or mitigate harm under specified circumstances, *id.*, § 21081. And beyond its rights under CEQA, Santa Clarita has proprietary interests, as owner of the project's surface estate, App. G-5, 46, and as an owner of property and employer of personnel at municipal sites within its city limits affected by the project, App. H-17. See, *e.g.*, *Catron County Bd. of Com'rs v. U.S. Fish & Wildlife Service*, 75 F.3d 1429, 1434 (CA10 1996); *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848-849 (CA9 1985).

The proposed mining project gravely threatens these interests. Through the simple expedient of stipulating to preemption, the County and the other signatories used the consent decree to extinguish these legally protectable interests with neither adjudication nor consent.[4]

Shortly after obtaining intervenor status, Santa Clarita moved the District Court to adjudicate these claims on their

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[4]Santa Clarita intervened specifically to protect these interests. It presented these claims in the first instance through its answer in intervention, which, for example, expressly denies Cemex's contention that the County's CEQA review process is preempted by federal law. See, *e.g.*, App. G-33-34. The answer also raises 29 affirmative defenses, including ripeness, Cemex's failure to exhaust, failure to state a claim, unclean hands, and violation of the Administrative Procedures Act. App. App. G-41-46. Specifically with respect to Cemex's preemption claims, the answer pleads, *inter alia*, that: (1) "[t]he conditions imposed, or recommended to be imposed, upon CEMEX's permit application by the County do not prevent the federal government from disposing of sand and gravel on federal land and are not . . . in conflict, or inconsistent, with federal law," App. G-43; (2) "[a]ny delays and/or continuances in the processing of CEMEX's application for a surface mining permit were the result of legitimate needs to further evaluate the Soledad Canyon Project's impact on the environment," App. G-43; and (3) "[t]he actions of the County in processing CEMEX's applications are expressly authorized and mandated by the Federal contracts and the ROD," App. G-45.

merits by filing a motion for summary judgment. App. H. If granted, the motion would have disposed of Cemex's complaint in its entirety, including its many causes of action related to federal preemption. The District Court, however, refused to hear this timely motion, opting instead to take the motion off calendar, to approve the consent decree, and to enter judgment. App. D.

The impact of the consent decree on Santa Clarita's validly raised claims is manifest. The consent decree impaired—indeed, obliterated—the very interests that Santa Clarita was granted intervention to protect. Pursuant to the consent decree, the County agreed to rescind 31 pages of findings supporting project denial and to halt any further CEQA review, thereby eradicating Santa Clarita's statutory right to consultation. App. C. The consent decree also finds that any further CEQA review would be preempted by federal law, *ibid*, thereby summarily disposing of all of Santa Clarita's defenses to Cemex's preemption claims. Finally, the decree compels the County to make findings and to issue permits approving the project, effectively foreclosing Santa Clarita's efforts to ensure a complete and thorough environment review and to include additional mitigation measures to protect Santa Clarita from the harmful environmental effects of the project.

There simply cannot be any doubt that Santa Clarita, like nonconsenting parties in numerous other cases dismissed upon consent decrees, has had its legal rights unceremoniously terminated without consent and without adjudication.

II. Review of a Consent Decree by a District Court Is No Substitute for a Party's Right to Adjudication of Its Claims

The consenting parties will, of course, be quick to point out that Santa Clarita did have an opportunity to be heard—in the "fairness hearing" on the decree—so due process must have been satisfied. But the question is less *whether* one was heard than *on what* one was heard. A "fairness hearing" does not ask if the nonconsenting party has rights and what they are; it asks whether the settlement is *fair to those consenting.* The District Court here was explicit that it deemed itself required to enter any consent decree "'that . . . is fair, reasonable and equitable and does not violate the law or public policy.'" App. C-95, quoting *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1355 (CA9 1990). It relied on the "arm's length" negotiations among the *consenting* parties as the basis for entering the decree and found no relevance in Santa Clarita's exclusion from those negotiations. App. C-100-102. That is a standard *no* bilateral consent decree could fail, no matter how it may trample the rights of third parties before the court. It illustrates the routine, now-doctrinal confusion of courts substituting the test of fairness to settling parties for an inquiry into the rights of non-settling parties.

The Ninth Circuit committed the same error on appeal, explicitly reviewing the consent decree under the standard for approving class-action settlements: whether "'the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.'" App. A-2, quoting *Officers for Justice*, 688 F.2d, at 625. But review of a class-action settlement is fundamentally different from review of a consent decree in a non-class action entered

over the objection of a nonconsenting party. When a court reviews a class-action settlement, it is inquiring mainly whether the class representative and counsel faithfully discharged their fiduciary duties to the class. Fed. Rule Civ. Proc. 23(e)(1)(C). When the court reviews a proposed consent decree to which a party has not consented, it should be asking whether the consenting parties are taking away from the nonconsenting party to whom they are adverse that which may not be summarily taken. The former standard could not be less appropriate to the latter inquiry.

The Rule 23 "fairness hearing" to approve a consent decree that binds a class is the logical outgrowth of the requirements placed on the class representative, that it represent the interests of the class "fairly and adequately." Rule 23(a). Therefore, a court may only approve a "settlement, voluntary dismissal, or compromise that would bind class members . . . after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate." Rule 23(e)(1)(C). Permitting objecting class members to present their objections to a consent decree during a "fairness hearing" is the due process that Rule 23 affords class members, providing them with a forum to show that their class representative did not adequately represent their interests. Once the court verifies that "the parties negotiated the consent decree in good faith and at arm's length" its inquiry is complete and it "find[s] the decree is 'fundamentally fair, adequate and reasonable.'" App. A-2, quoting *Officers for Justice*, 688 F.2d, at 625.

An intervenor has no such "representative." On the contrary, intervention as of right is permitted only when the applicant's interest is not already adequately represented by the existing parties. Rule 24(a). Thus, when it permitted Santa Clarita to intervene as of right, the Court of Appeals expressly found that Santa Clarita's interests were not

adequately represented by the existing parties, specifically that Santa Clarita's interests were not adequately represented by the County. App. B-7. To extinguish Santa Clarita's rights on a finding that parties adverse to Santa Clarita "negotiated the consent decree in good faith and at arm's length" is not to review the consent decree but to rubber-stamp it. No consent decree negotiated by adversaries will ever fail this test.

The Ninth Circuit's reliance on the class-action precedent in general, and *Officers for Justice* in particular, reveals how little thought courts now give to approval of consent decrees binding nonconsenting parties. *Officers for Justice* is clear that it is examining the proposed consent decree under Rule 23(e), and that the "primary concern of this subsection is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." *Officers for Justice*, 688 F.2d, at 624. Review of the decree is explicitly not to determine the merits but to see whether the compromise of class members' claims is reasonable given the costs and risks of litigation, potential for delay, and other risk-factors relevant to class members. *Ibid.*[5] The wooden application of Rule 23 standards to non-class cases illustrates how courts have misgrafed the Rule 23 "fairness hearing" onto the adversarial case, confusing the question whether a party has been treated fairly by its lawyers with the question whether a

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[5]The Court of Appeal quoted from *Officers for Justice* the phrase that the question is whether the consent decree is "fair, reasonable and adequate to all concerned." App. A-2, quoting 688 F.2d, at 625. It is clear from *Officers for Justice* that "all concerned" refers to class members and, plausibly, the settling adverse party and class counsel, who obviously have a stake in approval of a settlement. There is absolutely no indication that *Officers for Justice* understood a Rule 23 fairness hearing to implicate the interests of persons who are neither class members nor parties to the proposed settlement (of whom there were none in that case).

party has been treated fairly by its adversaries. A "fairness hearing" is adequate to the first question but cannot possibly suffice for the second.[6]

The procedural posture of the consent decree here offers an additional insight into the error. Santa Clarita had a motion for summary judgment pending, which the District Court took off calendar to allow it to approve the consent decree first. App. D-2. Had the Court entered summary judgment in favor of the consenting parties, that order would have been reviewed de novo by the Court of Appeals, with all inferences in favor of the non-moving party. *E.g.*, *Sheppard v. Beerman*, 317 F.3d 351, 354-355 (CA2 2003); *Orin v. Barclay*, 272 F.3d 1207, 1214 (CA9 2001). By the contrivance of a "fairness" finding, district courts simultaneously avoid a determination on the merits and insulate their rulings from meaningful appellate review.

In any other context, it would be preposterous to suggest that a trial court can dispose of a party's claim without a

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[6] *Lawyer v. Department of Justice*, 521 U.S. 567 (1997) is not to the contrary. Lawyer was a voter who sued the state and the U.S. Department of Justice, initially challenging on Equal Protection grounds a redistricting plan for his legislative district. In the course of the litigation, the Department of Justice and the state Attorney General agreed to invalidation of the challenged district and the drawing of a new district, to which the original plaintiff again objected. In upholding a consent decree entered over his objections, the Court said that he could not insist on adjudication of the original plan because it had been voided as he had demanded. 521 U.S., at 579-580 (calling plaintiff a "sore winner"). The Court also approved the lower court's disposition of plaintiff's objection to the new plan because he was given "unimpaired" rights to make his claims in the hearing on the consent decree. *Id.*, at 580. While that proceeding was mislabeled a "fairness hearing," *id.*, at 569, it is clear that it was in fact a hearing on the merits, see *id.*, at 574-575, constrained only by the fact that the plaintiff himself declined to tender any relevant evidence in support of his claims, *id.*, at 575. The Court was emphatic that "[t]here is no merit to appellant's contention that the District Court failed to adjudicate the constitutionality of" the new district. *Id.*, at 580 n. 7.

ruling on the merits and without meaningful appellate review. The fact that it has done so at the urging of parties hostile to the victim scarcely legitimizes the practice or the result.

III. *Firefighters* Has Led Subsequent Courts Erroneously to Authorize the Termination of Non-Settling Parties' Rights Without Adjudication

In *Firefighters*, plaintiff, an organization representing minority firefighters, had sued Cleveland alleging employment discrimination. Plaintiff and Cleveland negotiated a consent decree that provided for preferential promotions based on race. Firefighters Local Number 93, the bargaining agent for all firefighters, moved to intervene "as a party-plaintiff" but "did not allege any causes of action or assert any claims against either [plaintiff] or the City"—although it did object to the fairness of the proposed decree and expressed its "absolute and total objection to the use of racial quotas." 478 U.S., at 506-507, 511. However, as this Court noted, "[a]part from thus expressing its opinion as to the wisdom and necessity of the proposed consent decree, the Union . . . failed to assert any legal claims against either [plaintiff] or the City." *Id.*, at 511. In fact, "despite the efforts of the District Judge to persuade it to do so, the Union failed to raise any substantive claims." *Id.*, at 530. Given these facts, the Court approved the consent decree, finding that while "a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree[,] the consent decree entered here does not bind Local 93 . . . [and] imposes no legal duties or obligations on the Union at all." *Id.*, at 529-530 (citations omitted).

It is possible to read *Firefighters* narrowly, reflecting the fact that the intervenor simply failed to assert any claims or defenses. But that is not how it has subsequently been interpreted by many courts. And while it is certainly true that the circuits are split on this issue, the more important point is that the case law reveals confusion among the circuit courts about the meaning of *Firefighters* and the process due an objecting third party in cases involving consent decrees. Compare *City of Miami*, 664 F.2d, at 442, 447 (Rubin, J.) (invalidating bilateral consent decree in trilateral dispute to the extent that decree resolved claims of nonconsenting party); *City of Hialeah*, 140 F.3d, at 983-984 (affirming district court's refusal to enter portions of consent decree over objection of nonconsenting parties); *Sanguine, Ltd. v. United States Dep't of Interior*, 798 F.2d 389, 391-392 (CA10 1986) (vacating consent decree entered over objection of intervenor-defendants while district court's denial of intervention was pending on appeal); *Wheeler*, 582 F.2d, at 896 (reversing district court decision dismissing action based on consent decree over objection of intervenors that had properly asserted claims which remained unadjudicated) with *Ragsdale v. Turnock*, 941 F.2d 501, 504 (CA7 1991) (holding that consent decree was properly entered over objection of applicants who were denied intervention as of right in part because, had intervention been permitted, intervenors could block consent decree); *Southern California Edison Co. v. Lynch*, 307 F.3d 794, 807 (CA9 2002) (affirming approval of consent decree over objection of intervenor-defendants that properly pled defenses in the litigation); *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 278-279 (CA1 2000) (affirming district court's approval of consent decree over objection of intervenor-plaintiff); *Johnson v. Lodge #93 of Fraternal Order of Police*, 393 F.3d 1096, 1108-1109 (CA10 2004) (upholding approval of consent decree over objection of intervenor-defendant); *Kirkland v.*

New York State Dept. of Correctional Services, 711 F.2d 1117, 1125-1128 (CA2 1983) (affirming district court's entry of consent decree over objection of intervenor-defendant).

Some courts' expansive reading of *Firefighters*, applying it to intervenors as of right who have properly asserted claims or defenses, is largely attributable to inadequate analysis of what it means for a party to be "bound" by a consent decree, and to imprecise use of the word "claims," leading to abrogation of defenses held by intervenor-defendants.

One certainly cannot fault this Court for its recitation of the general rule:

> It has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent.

478 U.S., at 528-529. The near-tautology that parties may settle "their own disputes" is true but not helpful when a forthright examination of trilateral cases must acknowledge that the "disputes" the consenting parties are settling are decidedly not "their own." In *Firefighters* the dispute involved employees competing for the same jobs the settling parties were seeking. The intervenor was not seeking to block somebody else's settlement "merely by withholding its consent," it was seeking to protect its members' jobs and the promotion system it negotiated in collective bargaining.[7] This

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[7]And as then-Justice Rehnquist's dissent makes clear, the majority was erroneously relying for authority on cases involving permissive intervention.

difference is clear from the present case, where the consent decree to which the County agreed explicitly provides for the circumvention of the environmental review process detailed in CEQA,[8] a process in which the City has a legally protectable right to participate. App. B. Precisely the rights the Court of Appeals found to warrant Santa Clarita's intervention are abrogated by the consent decree.

Firefighters also makes a statement that has since contributed to confusion in the cases regarding what it means for a consent decree to "bind" a nonconsenting party:

> An intervenor as of right becomes a party to the action because "the disposition of the action may as a practical matter impair or impede his ability to protect that interest," Fed. Rule Civ. Proc. 24(a), whereas a permissive intervenor typically becomes a party only to ward off the potential effects of *stare decisis*.

478 U.S., at 539 n.* (Rehnquist, J., dissenting); see *Johnson*, 393 F.3d, at 1108-1109 (where permissive intervenors were afforded the opportunity to object to the consent decree, their rights were not affected by the consent decree and trial on the merits was not warranted).

[8]There is substantial doubt that the County even had the authority to stipulate to preemption. Article III, section 3.5 of the California Constitution prohibits administrative agencies from

> refus[ing] to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

Although one California court has applied this prohibition to local government officials, *Billig v. Voges*, 223 Cal. App. 3d 962, 969, 273 Cal. Rptr. 91 (1990), the California Supreme Court has left the question open for the moment. *Lockyer v. City and County of San Francisco*, 33 Cal.4th 1055, 1085-1086, 95 P.3d 459, 17 Cal. Rptr. 3d 225 (2004). For present purposes it suffices to note that a federal court that permits a creature of state law to neutralize other state laws by stipulation to federal preemption places unnecessary strains on the federal system and undermines compelling state interests memorialized, in this case, in the state Constitution.

> Of course, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor. And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree. However, the consent decree entered here does not bind Local 93 to do or not to do anything. It imposes no legal duties or obligations on the Union at all; only the parties to the decree can be held in contempt of court for failure to comply with its terms. Moreover, the consent decree does not purport to resolve any claims the Union might have under the Fourteenth Amendment, under § 703 of Title VII, or as a matter of contract.

478 U.S., at 529-530 (citations omitted). But the reason the union lost no claims is solely that it asserted no claims. Had it chosen to assert the claims of the employees not represented by the plaintiff, the Court would have had to acknowledge that, in the words of the dissent,

> the Court's suggestion . . . that "the consent decree entered here does not bind Local 93 to do or not to do anything," . . . verges on the pharisaical; the decree *does* bind the City of Cleveland to give preferential promotions to minority firefighters who have not been shown to be the victims of discrimination in such a way that nonminority

> union members who would otherwise have received these promotions are obviously injured.

478 U.S., at 537 (Rehnquist, J., dissenting (original emphasis)).

The majority opinion's assurance that the consent decree "does not bind" the nonconsenting third party suggests that a party is not "bound" unless the consent decree orders the party to do or not do something, exposes the party to contempt for non-compliance, or explicitly adjudicates the party's "claims" (of which it found the intervenor before it had none). But an intervenor-*defendant* such as Santa Clarita here is bound by the consent decree in two other ways not considered by *Firefighters*: First, the right Santa Clarita secured by intervention—the right to participate in the environmental-review process—was eliminated by the decree that simply terminated that process. And second, any attempt by Santa Clarita to sue the County for failure to discharge its state-law obligations would be foreclosed by the consent decree and by the preclusive effect of the judgment. As Prof. Laycock has observed: "If necessary for court approval of the decree, [consenting parties] may argue that [intervenor] will not be bound" but "after the decree is entered, [they] regularly argue that [intervenor] is bound. Often that argument is accepted." Laycock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. Chi. Legal F. 103, 119 (hereafter Laycock).[9]

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[9]The present case reflects precisely such a bait-and-switch scheme. The consent decree itself never mentions Santa Clarita. App. C-4-83. On the contrary, Santa Clarita is not listed as a party bound by the decree, App. C-20-21, and the decree does not expressly provide for Santa Clarita to release any claims against the consenting parties. App. C-33. Yet the District Court has embraced the consenting parties' position that, because Santa Clarita was permitted to participate as an intervenor in this action, it is now barred by preclusion principles from litigating any claim or issue which was, or could have been, raised in the present action. App. J-21-

The misdirection of the lower courts by *Firefighters* has been compounded by the confusing use of the word "claims." As the passage from pages 529-530 of *Firefighters* quoted at page 21, above, reveals, the majority recognized that a consent decree "may not dispose of the claims of a third party" and "therefore cannot dispose of the valid claims of nonconsenting intervenors," but because, the opinion holds, the union failed to assert any claims, the consent decree did not "dispose of" its claims. This limitation has led some courts to believe, as did the Ninth Circuit, that an intervenor must have "claims," and not "defenses," in order to be protected from a consent decree negotiated by other parties. See also *Southern California Edison Co.*, 307 F.3d, at 807. That is a misapprehension that has rendered the lower courts insensate to the rights of intervenor-*defendants*, who, of course, have "defenses," not "claims."

Typically an intervenor-defendant has no ripe claims; it is intervening, in effect, to prevent any claims from arising, by resisting the plaintiff's attempt to force the defendant to do something that prejudices the intervenor-defendant's rights. Thus, it has defenses, not claims. If, as here, the defendant with whom it is initially aligned switches sides, the defenses will ripen into claims against the now-nominal defendant. Were the defendant to switch by, say, contracting with the plaintiff to acquiesce to its demands, the intervenor-defendant would be able, if it wishes, to protect its interests by challenging the contract. But if the defendant switches by stipulating to a consent decree, the intervenor-defendant still has only defenses, not claims, until the decree is entered—at which time it becomes binding and it is too late for the intervenor-defendant to assert its claims *née* defenses.

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22. As Prof. Laycock predicted, pious disclaimers of binding effect were immediately followed by the consenting parties' and the Court's use of the consent decree to foreclose claims.

Functionally, nothing of importance inheres in the distinction between "claims" and "defenses" for these purposes. An intervenor may be injured equally by loss of a claim or a defense. Which form it suffers is an immaterial accident of timing and pleading, on which nothing should depend. Contrary implications in *Firefighters* should be disclaimed.

IV. The Use of Non-Consensual Consent Decrees Has Fostered Abuse in a Wide Range of Litigation and Systematic Violation of Third Parties' Rights, as This Case Demonstrates

What has been done to Santa Clarita in this case is typical of widespread abuse of consent decrees in recent years, abuse that will continue absent correction by this Court, which has been taken to have authorized the practice.

The use of "bilateral consent decrees in trilateral disputes," Laycock, *supra*, at 113, is driven not by a clash of reasonable litigants and obdurate intervenors, but by the opportunity that has been created for consenting parties to externalize the costs of their settlement onto non-settling parties. *Id.*, at 144. This abuse of consent decrees, invisible to the courts, has been widely acknowledged and criticized in the academic literature. See, *e.g.*, Mengler, Consent Decree Paradigms: Models Without Meaning, 29 B.C. L. Rev. 291, 332-335 (1988); Laycock, *supra*; Easterbrook, Justice and Contract in Consent Judgments, 1987 U. Chi. Legal F. 19, 31 & n. 18; Cooper, The Collateral Attack Doctrine and the Rules of Intervention: A Judicial Pincer Movement on Due Process, 1987 U. Chi. Legal F. 155, 165; Coleman & Silver, Justice in Settlements, 4 Soc. Phil. & Policy 102, 113-114 (1986).

In the most common illustration of the practice, employees sue an employer alleging discrimination and a different group of employees intervenes to protect its members' interests in the employer's practices. The plaintiff may represent minority employees alleging discrimination or majority employees alleging reverse-discrimination. The plaintiff and the defendant are able to negotiate a bilateral consent decree precisely because they are taking from the nonconsenting intervenor. Ever since this Court held in *Firefighters* that the consent decree may be entered without proof of prior discrimination, see 478 U.S., at 532 (White, J., dissenting) and may exceed the relief that could be obtained in a contested adjudication, 478 U.S., at 525, the opportunity for litigants to agree on consent decrees at the expense of nonconsenting parties has proven irresistible.[10]

The practice is by no means limited to employment discrimination. It has been used to subvert the interests of religious groups having a free-exercise claim, *e.g.*, *Wilder v. Bernstein*, 645 F.Supp. 1292 (SDNY 1986) (children represented by ACLU and city agree to consent decree requiring religious social-service agencies to provide services without regard to religion); see also *Harrisburg Ch. ACLU v. Scanlon*, 500 Pa. 549, 458 A.2d 1352 (1983) (ACLU and state agree to consent decree prohibiting prayer meetings on school property), to eliminate water-rights claims, *e.g.*, *Steiner v. County of Marshall*, 568 N.W.2d 627 (S.D. 1997) (upstream landowners and county stipulate to consent decree diverting water from downstream lands owned by nonconsenting intervenors), to prevent financial institutions from asserting their rights, *e.g.*, *United Services Auto. Ass'n v. Foster*, 783 F.Supp. 916 (MD Pa. 1992) (approving consent decree to

[10]Indeed, economists and game theoreticians have shown how three-way competition rationally results in two competitors forming a coalition against the third. *E.g.*, J.M. Buchanan & G. Tullock, The Calculus of Consent 148-150 (1963).

which state and insurer agreed, over banks' objection, to invalidate state law prohibiting insurers from owning banks), to impose obligations on health insurers, *Ten. Ass'n of Health Maint. Orgs. v. Grier*, 262 F.3d 559 (CA6 2001) (binding managed care organizations to modifications to consent decree between state and Medicaid recipients), to erase environmental claims of community groups, *e.g.*, *Comunidades Unidas Contra La Contaminacion*, 204 F.3d, at 275 (approving consent decree over local resident intervenors' objections), to deny adjudication of challenges to segregated schools, *e.g.*, *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 921 F.2d 1371 (CA8 1990) (instructing intervenor minority students objecting to consent decree abiding segregated schools to see how it works out and then to move for modification of the decree), and to reject anti-abortion challenges, *e.g.*, *Ragsdale*, 941 F.2d 501 (approving consent decree enjoining state laws regulating abortion and denying intervention to abortion opponents).[11]

The perils of this practice are illustrated by this and other cases involving local environmental regulation. Statutes like California's CEQA and the federal NEPA impose special duties on government agencies that issue permits and otherwise authorize projects that may have an impact on the environment. These duties have been legislatively imposed precisely to offset the tendency of some agencies to favor projects at the expense of the environment. Bilateral consent

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[11] A related abuse of consent decrees led the Department of Justice to issue guidelines sharply restricting the government's use of consent decrees to control the discretion of federal agencies or to abdicate executive authority. Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys, Re: Department Policy Regarding Consent Decrees and Settlement Agreements (March 13, 1986), reprinted in Review of Nixon Presidential Material Access Regulations: Hearings Before the Subcomm. on Government Operations, 99th Cong., 2d Sess. 1982 (1986).

decrees offer a project proponent and a compliant local agency the opportunity to relieve the agency of such special duties and to neutralize environmental legislation.

Such decrees are also inimical to the agency's regulatory function, again as this case illustrates. The County was required to hold hearings, take evidence, receive comments, and then to make findings and issue a report based on that material. Instead, it has agreed to be mandatorily enjoined to approve the Soledad Canyon project, to certify its most recent environmental impact report "without further public review or comment," to accept the adequacy of mitigation measures, to disregard any "significant new information," to adopt a statement of overriding considerations to justify environmental harm, to make findings prescribed verbatim in the consent decree, to issue all permits, and to approve Cemex's reclamation plan, App. C-22, 32, 72-80. By consenting to the decree the County has reduced itself to a puppet regime. A federal court should not allow itself to be the instrument of subversion by faithless local governments.

V. The Proper Use of Consent Decrees Will Permit Courts to Continue to Resolve Disputes Between Settling Parties While Preserving the Valid Claims of Nonconsenting Parties

Santa Clarita recognizes the value of voluntary resolution of litigation and does not dispute the strong judicial policy in favor of settlements. *E.g.*, *T.D. v. LaGrange School Dist. No. 102*, 349 F.3d 469 (CA7 2003). The limits of a bilateral consent decree in a trilateral dispute need not prevent willing parties from settling litigation, provided the settlement does not attempt also to dispose of the properly raised claim

of a nonconsenting intervenor as of right. Parties may continue to avert the unpredictable expense and demands of litigation by voluntarily entering into agreements to end a lawsuit by consent decree. As long as such decrees do not infringe the claims of an intervenor as of right, they should readily be approved by the courts. But judicial dockets cannot be cleared by pretending parties are settling disputes when in fact some parties are simply having their claims and defenses taken away.

Parties typically pursue settlements to avoid litigation costs and litigation risks. These objectives can easily be realized without sacrificing third-party rights. If a defendant wishes to settle and an intervenor-defendant will not join in a consent decree, the defendant can simply step aside and allow the intervenor to incur the costs of defense—as defendants often do. Or the defendant may contractually agree to the plaintiff's demands, allowing the intervenor-defendant to challenge the agreement and leaving the original plaintiff to defend the result. And when the plaintiff and defendant settle, they can also negotiate hold-harmless or other terms that will satisfy the defendant's desire to avoid litigation risk. These goals can be achieved without abridging the rights of intervenor-defendants as of right. The difference between these options and a bilateral consent decree is that the defendant avoids the cost of litigation without sacrificing the intervenor-defendant's rights.

This case illustrates how easily the legitimate interests of settling parties can be reconciled with the irreducible rights of intervenors as of right. The County could simply have agreed not to dispute preemption as Cemex and Santa Clarita litigated the issue. As a practical matter, such a concession by a government entity is enormously influential and well worth the bargain to the plaintiff. Or the County could have agreed contractually to approve the EIR and to issue the permits,

leaving it to Santa Clarita, if it wished, to seek judicial relief—where Cemex could agree to defend the County. In either case, Cemex would have substantially improved its position on the merits, and the County would have been free of the litigation costs, without creating a fictional "settlement" to deprive a non-settling party of its rights.

What these alternatives do not permit is what the consenting parties cannot have—the abrogation of intervenor-defendant's rights without adjudication. No defensible judicial policy favors facilitation of settlements between two parties by allowing them to appropriate the rights of non-settling parties to the lawsuit with neither their consent nor adjudication of their rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

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